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Supreme Court, U.S.
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No. 09-282

In The Supreme Court of the United States

GRANT L. DAVIS and
DAVIS, BETHUNE & JONES, L.L.C.,
Petitioners,

v.

JEROME S. TILZER, TODD TILZER,
and JILL JOKELSON,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Kansas

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of Kansas violated Article IV, Section 1, of the Constitution of the United States, by not giving full faith and credit to a gratuitous fact finding contained in an order of a Missouri trial court where the parties subject to the order did not have full and fair opportunity to litigate the issue in the Missouri court.

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COUNTERSTATEMENT OF THE CASE

The facts of the case are stated in the decision of the Supreme Court of Kansas:

FACTUAL OVERVIEW

> In September 2001, Rita Tilzer hired attorney Grant L. Davis and his firm Davis, Bethune & Jones, L.L.C., to represent her in an action against drug manufacturers Eli Lilly and Company and Bristol-Meyers Squibb Company for negligently enabling pharmacist Robert Courtney to dilute her cancer drugs. The lawsuit was one of several hundred individual suits filed in Jackson County, Missouri, by cancer patients or their surviving family members; Davis represented many, but not all of the plaintiffs. After Rita Tilzer died in January 2002, her husband and children were substituted as plaintiffs. Derek E. Jokelson, an attorney from Philadelphia and son-in-law of Rita Tilzer, acted as cocounsel for Tilzers after being admitted pro hac vice in the Missouri proceeding. Jokelson is not a named defendant in the Kansas malpractice action.
>
> After commencement of the trial in another patient's separate case in October 2002, the pharmaceutical companies offered a settlement proposal. After mediation, a settlement agreement was reached in which all plaintiffs who had filed a lawsuit against the companies were eligible to "opt in." Under the agreement, titled "Global Settlement," the defendants would establish a settlement fund of not less

than a specified amount and not more than a specified amount, with the exact amount to be determined through binding arbitration.

The Missouri trial judge, Judge Lee Wells, appointed two special masters. One was a former circuit court judge and the other was a former Missouri Court of Appeals judge. Judge Wells worked with the special masters to develop a system for evaluating the individual claims, apparently with a view to avoiding the Global Settlement being classified as an aggregate settlement. Essentially, the special masters would apply uniform standards to each claimant who had opted in to the settlement and would determine the amount of money each claimant would receive from the settlement fund.

Tilzers opted in to the settlement agreement and completed the applicable claim form. The documents that Tilzers signed included an agreement to keep the terms of the settlement confidential. The special masters established the dollar amount to be awarded to Tilzers, and Judge Wells approved that award, despite Tilzers' objection. On November 24, 2003, the pharmaceutical companies filed a motion to enforce the settlement agreement, requesting that the court order Tilzers to execute a dismissal with prejudice and otherwise comply with the terms of the agreement. Two days later, Davis filed a motion to enforce an attorney's lien in the Missouri case.

Tilzers opposed the motion to enforce settlement, arguing that the agreement was "(1) illegal and unethical on its face; (2)[was] in violation of Rule 4-1.8(g); and (3)[had] been obtained through deceit and fraud in factum." at a December 22, 2003, hearing, Tilzers acknowledged that a formal response to the attorney's lien motion had not yet been filed, but advised Judge Wells that Tilzers' arguments in opposition to Davis' attorney's lien motion would track Tilzers' response to the drug companies' settlement enforcement motion. With the parties' consent, the judge continued the hearing on Davis' attorney's lien motion to January 2, 2004.

On December 30, 2003, Tilzers filed a counterclaim against Davis, alleging breach of fiduciary duty, professional negligence, and breach of contract. Tilzers asserted the same claims in a separate action filed in the United States District Court for the District of Kansas prior to January 2, 2004. That separate federal court action was subsequently dismissed for lack of complete diversity.

At the scheduled motion hearing on January 2, 2004, Tilzers sought a continuance to allow for discovery on its counterclaim. Tilzers expressed concern that the legal malpractice claim might later be deemed a compulsory counterclaim to the motion for enforcement of the attorney's lien, and, if so, Tilzers asserted that they were entitled to fully litigate the matter, including the right to conduct discovery and to submit the question to a jury. Judge

Wells expressed a desire to conclude the Missouri case and denied the continuance. However, the judge informed the parties that he did not intend for his ruling on the attorney's lien motion to foreclose any future legal malpractice action. The Tilzers withdrew from the hearing to avoid a later claim that they were collaterally estopped on their legal malpractice claims. The court heard the testimony of Grant Davis and Jerome Tilzer.

In its January 14, 2004, order, the court granted Davis' motion on the attorney's lien and memorialized its order granting enforcement of the settlement agreement. Judge Wells specifically found that the Global Settlement was not an aggregate settlement within the meaning of Rule 4-1.8(g), because of the methodology developed by the court and special masters. The court also found no credible evidence of any misconduct by Davis.

The Tilzers did not appeal the Missouri trial court's rulings. On April 5, 2004, Tilzers dismissed their counterclaim. Approximately 3 weeks later, Tilzers filed the instant legal malpractice action in the District Court of Johnson County, Kansas, claiming breach of fiduciary duty, professional negligence, negligent misrepresentation, breach of contract, and fraud arising from Davis' representation in the Missouri action. Tilzers specifically alleged that the Missouri settlement agreement was effectively an aggregate settlement and that Davis had failed to comply with the disclosure requirements of Rule 4-1.8(g).

During discovery in the Kansas malpractice action, Tilzers filed a motion to compel the testimony of Grant Davis, to which they attached documents containing information which they had agreed to keep confidential in the Missouri proceeding. The pharmaceutical companies intervened to request that the Kansas court order that any documents, pleadings, or other materials containing the terms of the Missouri settlement agreement be filed and maintained under seal. Over Tilzers' objection, the Kansas court granted the intervenors' motion.

Davis filed a summary judgment motion, claiming that the malpractice claims were compulsory counterclaims to the motion to enforce his attorney's lien in the Missouri action and, accordingly, were now res judicata in the Kansas action. Further, Davis argued that the aggregate settlement question, as well as the other claims of legal malpractice, were litigated as defenses to the motion to enforce the attorney's lien in the Missouri proceeding, and, therefore, the doctrine of collateral estoppel also precluded relitigating the issues in the current proceeding. The Tilzers responded with their motion for partial summary judgment, asking the court to find that Davis participated in the making of an aggregate settlement without providing Tilzers with the disclosures required by Rule 4-1.8(g).

The Johnson County District Court granted summary judgment to Davis, finding that all of Tilzers' claims arose from the attorney-client

> relationship in the Missouri action for which Davis had sought to enforce an attorney's fee lien. The Kansas court interpreted the Missouri compulsory counterclaim rule as requiring Tilzers' malpractice claims to have been asserted in the Missouri action, and, accordingly, found Davis "entitled to summary judgment on the codified res judicata claim preclusion grounds." Further, the Kansas court determined that Tilzers were collaterally estopped from relitigating the aggregate settlement question.
>
> The Kansas court denied Tilzers' motion for partial summary judgment, reasoning that because "the amount that each of [Davis'] clients would receive [under the settlement] was not and could not have been known by the lawyers prior to the announcement to all of the opted in claimants ... this could not be an aggregate settlement contemplated by the rules of professional conduct."
>
> Tilzers filed a timely appeal of the summary judgment rulings, and the case was transferred to this court, pursuant to K.S.A. 20-3018(c).

Tilzer v. Davis, Bethune & Jones, L.L.C., 204 P.3d 617, 620-23 (Kan. 2009). The allegations that the Tilzers have made against Davis are contained in the Petition appended hereto.

ARGUMENT

The finding by the Missouri trial court that there was no aggregate settlement is not entitled to

collateral estoppel effect under Missouri law, as so held by the Supreme Court of Kansas, and therefore is not entitled to full faith and credit in the action brought by the Tilzers against the lawyers in Kansas.

> The constitutional command of full faith and credit, as implemented by Congress, requires that 'judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.' Full faith and credit thus generally requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it. 'By the Constitutional provision for full faith and credit, the local doctrines of res judicata, speaking generally, become a part of national jurisprudence, and therefore federal questions cognizable here.' *Riley v. New York Trust Co.*, 315 U.S. 343, 349, 62 S.Ct. 608, 612 L.Ed. 885.

Durfee v. Duke, 375 U.S. 106, 109 (1963). "From judicial experience with and interpretation of the clause, there has emerged the succinct conclusion that the Framers intended it to help weld the independent states into a nation by giving judgments within the jurisdiction of the rendering state the same faith and credit in sister states as they have in the state of the original forum." *Johnson v. Muelberger*, 340 U.S. 581, 584 (1951). Thus, as stated by Chief Justice Marshall, "the judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to

a suit thereon in such state, and none others, could be pleaded in any other court in the United States." *Hampton v. McConnel*, 16 U.S. 234, 4 L.Ed. 378 (1818).

The Full Faith and Credit Clause is a national mandate for applying res judicata principles, including both claim preclusion and issue preclusion.

> A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (res judicata) purposes, in other words, the judgment of the rendering State gains nationwide force. See, *e.g., Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 373, 116 S.Ct. 873, 878, 134 L.Ed.2d 6 (1996); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 485, 102 S.Ct. 1883, 1899, 72 L.Ed.2d 262 (1982); see also Reese & Johnson, The Scope of Full Faith and Credit to Judgments, 49 Colum.L.Rev. 153 (1949).

Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998). Hence, a sister state must look at the forum state's law to determine whether under such forum state's law, the judgment is entitled to preclusive effect. See, e.g., *Ford v. Ford*, 371 U.S. 187 (1962).

Davis complains that the Supreme Court of Kansas erred in failing to give full faith and credit to the fact finding by the Missouri trial court in support of the granting of the attorney's lien that there was no aggregate settlement within the meaning of Rule 4-1.8(g) of the Missouri Supreme Court Rules of

Professional Responsibility. The Supreme Court of Kansas in reaching its decision construed and applied Missouri law to determine that the fact finding of the Missouri trial court was not preclusive as to whether Davis participated in making an aggregate settlement without the requisite disclosure and informed consent.

First, the Supreme Court of Kansas determined under Missouri law that a malpractice claim was not a compulsory counterclaim that must be brought in reaction to the motion to enforce attorney's fee lien filed by Davis for claim preclusion purposes. The Kansas court relied on a New Mexico case involving very similar facts and very similar law regarding procedures for lawyers seeking to collect fees against judgments. *Computer One, Inc. v. Grisham & Lawless, P.A.*, 188 P.3d 1175 (N.M. 2008).

> While the New Mexico precedent is not binding authority, its reasoning is persuasive, especially in light of Missouri case law establishing the methods by which attorneys may recover fees from their clients: (1) By proceeding against the client; (2) by proceeding against the defendant, either by motion in the original case or in an independent proceeding; or (3) by proceeding against the judgment itself. *Nelson v. Massman Const. Co.*, 120 S.W.2d 77, 89 (Mo.App.1938). By moving to enforce an attorney's fee lien in the underlying action, Davis was proceeding against the judgment itself, not against the former client. Such an action does not transform the former client into an "opposing party" for purposes of the compulsory counterclaim rule. To invoke that rule, Davis had to file an independent action

> against Tilzers, i.e., had to become a "party" in the first instance.
>
> In conclusion, the district court erred in finding that Missouri's compulsory counterclaim rule required Tilzers to assert their legal malpractice claims as a response to Davis' motion to enforce an attorney's fee lien in the underlying Missouri lawsuit. Summary judgment on the issue of claim preclusion is reversed.

Second, and more importantly since petitioners base their petition on the assertion that the Supreme Court of Kansas failed to confer full faith and credit to the fact finding of no aggregate settlement, the Supreme Court of Kansas held, again applying Missouri law, that the finding was not entitled to collateral estoppel effect. The Kansas court stated that under Missouri law:

> In analyzing the fourth factor or element of collateral estoppel, i.e., whether Tilzers had a full and fair opportunity to litigate the issue in the Missouri lawsuit, the Kansas court noted that Missouri courts look at an additional four factors to resolve this step, to wit:
>
> > "(1) did the party against whom collateral estoppel is asserted have a strong incentive to litigate the prior adjudication; (2) does the second forum afford the party against whom collateral estoppel is asserted procedural opportunities not available in the first action; (3) is the prior judgment, upon

> which collateral estoppel is based, inconsistent with one or more prior judgments; and (4) was the forum in the first action substantially inconvenient to the party against whom collateral estoppel is asserted[?]" *Wilkes*, 92 S.W.3d at 122.

Tilzer supra at 626. The Supreme Court of Kansas disagreed with the Kansas trial court about whether the Tilzers had sufficient opportunity to conduct discovery and prepare for a trial on the issue of whether an aggregate settlement had been reached.

> The short time line in the motion proceedings made meaningful discovery impracticable. Moreover, it is counterintuitive to declare that the unavailability of discovery is not prejudicial unless the complaining party can identify the witnesses and documents that would have been discovered. One of the purposes of the discovery process is to enable a party to learn of those witnesses and documents which will be useful in the litigation.

Tilzer supra at 626. The Tilzers never had a fair chance to litigate the aggregate settlement issue before the Missouri trial court; the Tilzers only obtained a full and fair opportunity to discover the facts underlying the settlement that brought Davis millions of dollars in legal fees in the legal malpractice action currently pending in the District Court of Johnson County, Kansas, where Davis resides. Thus, the fact finding is not due full faith and credit because it would not have been accorded collateral estoppel effect in another Missouri court.

Separately, and

Additionally, the collateral estoppel doctrine in Missouri only applies "to those issues that were necessarily and unambiguously decided" in the prior adjudication. See *Kays*, 181 S.W.3d at 566. While Judge Wells unambiguously ruled that the Global Settlement was not invalid as an aggregate settlement, his ruling on the issue in the context of the attorney fees motion is less straightforward. More importantly, however, a ruling on the aggregate settlement issue does not appear to have been necessary for Judge Wells' decision on Davis' attorney's fee lien motion.

The Missouri court announced that its order enforcing the attorney's fee lien would not affect Tilzers' malpractice claims against Davis. Apparently, the court viewed the task presented by the attorney's fee lien motion to be a calculation of the amount of fees that Tilzers contracted to pay Davis and a determination of the reasonableness of those fees. In that event, the aggregate settlement issue was only relevant, if at all, to the question of whether Tilzers were entitled to an offset against Davis' attorney's fee lien based on malpractice. If the Missouri court was declining to rule on the malpractice claim, it had no reason to reach the subissue within that claim regarding any violations of the disclosure requirements of Rule 4-1.8(g). In other words, the ruling on the aggregate settlement issue was gratuitous and unnecessary to the decision rendered on the attorney's fee lien.

Tilzer supra at 626-27. The finding by the Missouri trial court of no aggregate settlement was indeed gratuitous. Davis sought such finding as a shield in a malpractice action, despite the admonition of Judge Wells that his ruling would have no effect on a prospective malpractice claim, and not as a condition to enforcing an attorney's fee lien. The Tilzers had no cause to appeal the mechanical determination of the attorney's fee lien. The Tilzers had nothing to appeal because they were not contesting the fee allocation and because they had the right to proceed with a malpractice action as iterated by Judge Wells.

As a function of proper choice of law principles, the Supreme Court of Kansas appropriately applied Missouri law. Although it is true that the Missouri trial court was arguably applying Missouri law to construe the Missouri aggregate settlement disciplinary rule, the Supreme Court of Kansas is fully qualified to make such a determination. Full faith and credit law does not require that only forum states courts may construe the law of the forum state. The aggregate settlement rule is common to all of the states. The rule was codified in the American Bar Association Model Code of Professional Responsibility and carried over to the American Bar Association Model Rules of Professional Conduct. All states have long adopted the rule. There are few cases construing what constitutes an aggregate settlement.

In this case, however, the Supreme Court of Kansas, unlike the Missouri trial court, had the benefit of the observations of the American Law Institute concerning Principles of the Law of Aggregate Litigation:

> "Definition of a Non-Class Aggregate Settlement
>
> "(a) A non-class aggregate settlement is a settlement of the claims of two or more individual claimants in which the resolution of the claims is interdependent.
>
> "(b) The resolution of claims in a non-class aggregate settlement is interdependent if:
>
> (1) the defendant's acceptance of the settlement is contingent upon the acceptance by a number or specified percentage of the claimants; or
>
> (2) the value of each claim is not based solely on individual case-by-case facts and negotiations." Principles of the Law of Aggregate Litigation §3.16, p. 322.

Tilzer supra at 628. The Supreme Court of Kansas went on to observe that:

> Under the ALI definition, the Global Settlement had both characteristics of interdependency which define an aggregate settlement. There was collective conditionality because the pharmaceutical companies were granted the right to opt out of the settlement if fewer than all of the covered plaintiffs accepted the proposed settlement. Although Judge Wells attempted to circumvent the conditional allocation characteristic by appointing special masters to individually assess each claim, the Global Settlement contained a maximum amount that the defendants would pay into the

> settlement fund and provided for an across-the-board minimum payment to all opt-in claimants. In other words, each claimant did not receive individualized, fact-specific damages, but rather each claimant received an individualized, fact-specific allocation of a proportion of the capped settlement fund, subject to a minimum award for every participant.

Tilzer supra at 628-29. The Global Settlement was an aggregate settlement sans informed consent. The Global Settlement benefited the drug companies because it capped their exposure. The Global Settlement benefited Davis because it reduced to capture his fee interest and obviated his duty and incentive to fully advocate on behalf of his individual clients. The Global Settlement however was not to the benefit of the claimants who were so horribly injured by Courtney and the drug companies because they had no idea what their allocations would be in their inherent competition with all of the other claimants.

> The Kansas district court was seduced by Judge Wells' opinion that the Global Settlement could not be an aggregate settlement because the information that Rule 4-1.8(g) required to be disclosed to obtain an informed consent was not available to Davis. However, that dearth of information was the direct result of the interdependent characteristics of the Global Settlement, i.e., the information could not be ascertained because the arrangement was an aggregate settlement. Rather than establishing a non-aggregate settlement, the unavailability of the information required to be disclosed by

> Rule 4-1.8(g) simply corroborated that it was an aggregate settlement and rendered it impossible for Davis to obtain an informed consent under the rule. The district court's ruling to the contrary was erroneous.

Tilzer supra at 629. The claimants, including the Tilzers, could not have made an informed decision about whether to participate in this aggregate settlement without knowing whom they were competing against in the divvying up of the settlement pie.

Finally, and perhaps more fundamentally,

> Thus, even in the Kansas malpractice action, a finding that Davis violated Rule 4-1.8(g) is unnecessary. Obviously, the Missouri action was not an attorney disciplinary proceeding, and an interpretation of the applicability of the ethical rules was not required. Accordingly, the Kansas district court erred in applying the doctrine of collateral estoppel.

Tilzer supra at 627. The Tilzers' claims do not all turn on whether Davis violated the aggregate settlement rule. A determination that full faith and credit should be accorded Judge Wells' gratuitous finding therefore would not fully resolve the Tilzers' claims against Davis.

CONCLUSION

The Supreme Court of Kansas had no obligation to give full faith and credit to the fact finding of the Missouri trial court that there was no aggregate

settlement because such finding was an unnecessary finding and because the Tilzers did not have full and fair opportunity to litigate the issue in the Missouri court. Because such fact finding was not entitled to issue preclusive effect in Missouri under Missouri law, it likewise is not entitled to issue preclusive effect in a sister state under the Full Faith and Credit Clause. The Court should therefore deny the petition for writ of certiorari.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

Case No. 04CV3239
Division No. 10

JURY TRIAL DEMANDED

[Filed April 26, 2004]

JEROME S. TILZER, INDIVIDUALLY AND AS THE PLAINTIFF AD LITEM FOR RITA TILZER, TODD A. TILZER, and JILL JOKELSON,	)
Plaintiffs,	)
v.	)
DAVIS, BETHUNE & JONES, LLC and DAVIS, KETCHMARK, EISCHENS & McCREIGHT, P.C., GRANT L. DAVIS, individually, and MICHAEL S. KETCHMARK, individually,	)
Defendants.	)

PETITION

COME NOW Plaintiffs, Jerome S. Tilzer, individually and as the Plaintiff ad Litem for Rita Tilzer, Todd A. Tilzer and Jill T. Jokelson, and for their causes of action against Defendants Davis, Bethune & Jones, LLC, a Missouri Limited Liability Company, and Davis, Ketchmark, Eischens & McCreight, P.C., a Missouri Professional Corporation, and Grant L. Davis, individually, and Michael S. Ketchmark, individually, and state and allege as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Jerome S. Tilzer is an individual, was the husband of the late Rita Tilzer, is the proper legal representative of the estate of Rita Tilzer, and resides at 10212 Mohawk Lane, Leawood, KS 66206.

2. Plaintiff Todd A. Tilzer is an individual, was the natural child of the late Rita Tilzer, and resides at 620 Jasmine, Denver, CO 80220.

3. Plaintiff Jill Jokelson is an individual, was the natural child of the late Rita Tilzer, and resides at 1710 Addison Street, Philadelphia, PA, 19146.

4. Plaintiff Jerome S. Tilzer, individually and as the Plaintiff ad Litem for Rita Tilzer, Todd A. Tilzer, and Jill Jokelson will collectively be referred to as "Plaintiffs Tilzer" and/or "Plaintiffs."

5. Defendant Davis, Bethune & Jones, LLC (hereinafter "Defendant Davis, Bethune") is a Missouri limited liability corporation, with its principal place of business and registered address at 1100 Main Street, Suite 2930, Kansas City, MO 64196, whose registered

agent, Scott S. Bethune, may be served at 628 W. 67th St., Kansas City, MO 64133.

6. Defendant Davis, Ketchmark, Eischens & McCreight, P.C. (hereinafter "Defendant Davis, Ketchmark") is a Missouri professional corporation, with its principal place of business and registered address at 2345 Grand Boulevard, Suite 2110, Kansas City, MO 64108, whose registered agent, Scott A. McCreight, may be served at 2345 Grand Blvd., Suite 2110, Kansas City, MO 64108.

7. Defendant Grant L. Davis is an individual who may be served at his residence at 8833 Ensley Ct., Shawnee Mission, Kansas 66206.

8. Defendant Michael S. Ketchmark is an individual who can be served at 2345 Grand Boulevard, Suite 2110, Kansas City, MO 64108.

FACTUAL ALLEGATIONS COMMON TO ALL COUNTS

9. Plaintiffs hereby incorporate by reference all facts and allegations contained in paragraphs 1 through 8 of this Petition as if fully set forth herein.

10. At all relevant times, Grant Davis, Shawn Foster, and Timothy Brake were lawyers practicing as principals and/or employees of Defendant Davis, Bethune, and held themselves out to the public as attorneys possessing greater than ordinary knowledge and skill in the field of torts, personal injury, and civil litigation. Furthermore, at all relevant times, Grant Davis, Shawn Foster, and Timothy Brake, were agents

of and acted on the behalf of Defendant Davis, Bethune.

11. At all relevant times, Michael Ketchmark and Scott McCreight were lawyers practicing as principals and/or employees of Defendant Davis, Ketchmark, and held themselves out to the public as attorneys possessing greater than ordinary knowledge and skill in the field of torts, personal injury, and civil litigation. Furthermore, at all relevant times, Michael Ketchmark and Scott McCreight were agents of and acted on the behalf of Defendant Davis, Ketchmark.

12. Rita Tilzer was one of thirty-four admitted victims of Robert R. Courtney's drug dilution scheme.

13. Plaintiff Jerome S. Tilzer was married to Rita Tilzer when she died on January 6, 2002. They had two children, Jill Jokelson and Todd Tilzer. Had Rita Tilzer lived seventy-one (71) days longer, she would have seen her first grandchild.

14. On or about September 11, 2001, Plaintiff Jerry Tilzer acting as attorney in fact for Rita Tilzer entered into a Contract for Employment of Attorneys with Defendant Davis, Bethune. Rita Tilzer died on January 6, 2002. The purpose of this contract for legal services was to pursue Plaintiffs' claims against Robert Courtney, Courtney Pharmacy, Eli Lilly, Bristol-Meyers Squibb, and any others who may be liable to the Plaintiffs for injuries and damages arising out of the diluted chemotherapy treatment provided to Rita Tilzer. The contract was mailed by Defendants to Jerry Tilzer at his home in Johnson County, Kansas and was executed there by Jerry Tilzer.

15. Pursuant to the Contract for Employment of Attorneys, Defendant Davis, Bethune associated in the representation of Plaintiffs with Defendant Davis, Ketchmark, and from mid-September, 2001, until November 26, 2003, Defendants Davis, Bethune and Davis, Ketchmark ("Defendant Law Firms"), represented the Plaintiffs Tilzers with respect to their claims for injuries and damages arising out of the diluted chemotherapy treatment provided to Rita Tilzer.

16. Prior to engaging Defendants, Plaintiffs were assured by Defendants, through Grant Davis, Esquire, that Defendants would treat all cases which they handled involving Courtney as individual claims and that the cases would not be treated as a class action or in an aggregate manner. Rather, Plaintiffs were assured that each case would be treated in an individual and competent manner. It was, in part, based upon these assurances that Plaintiffs hired Defendants.

17. Defendants' representation of Plaintiffs Tilzer included prosecution of their claims against Robert Courtney, Courtney Pharmacy, Pharmacists' Mutual Insurance Company, Eli Lilly and Company, and Bristol-Meyers Squibb Company, and any others who may be liable to Plaintiffs Tilzer for the damages resulting from the diluted chemotherapy treatment provided to Rita Tilzer.

18. Pursuant to Defendants' employment agreement with Plaintiffs Tilzer, Defendant Law Firms had no right to settle or compromise Plaintiffs Tilzers' claims without client consent.

19. On October 12, 2001, Defendants Davis, Bethune and Davis, Ketchmark filed an Amended Petition for Damages in the name of Rita Tilzer against Courtney Pharmacy, Inc., Robert R. Courtney, Eli Lilly and Company, and Bristol-Meyers Squibb Company, asserting causes of action on behalf of Rita Tilzer under the theories of Loss of Chance of Survival, Negligence, Violation of Missouri Merchandising Practice Act, Fraud, Negligent Misrepresentation, Negligent Entrustment, Strict Product Liability, Failure to Warn, Negligent Infliction of Emotional Distress, Breach of Implied Warranty, and Intentional Infliction of Emotional Distress.

20. From mid-September of 2001 forward, Plaintiffs Tilzer relied on Defendant Law Firms to represent them with respect to all claims they may have against any party arising out of the diluted chemotherapy treatment provided to Rita Tilzer.

21. At all times relevant, the Defendant Law Firms represented to Plaintiffs Tilzer that:

a. The Law Firms would represent Plaintiffs Tilzer with respect to all of their claims, and against all parties, arising out of the diluted cancer treatment provided to Rita Tilzer;

b. No settlement would be entered into without the consent of Plaintiffs Tilzer;

c. The merits of the Plaintiffs Tilzers' claims/case against the drug companies were excellent;

d. The Tilzer case would be pursued individually and not as a part of a class action, group case, or global settlement;

e. The Tilzer claims had been selected as one of the four lead cases, including being designated for early trial; and,

f. The trial of the Tilzers' claims would follow shortly after the trial of the claims of Mrs. Georgia Hayes, beginning in early October of 2002.

22. From September of 2001, Defendant Law Firms represented numerous other plaintiffs and claimants against Courtney and certain drug companies, including Eli Lilly and Squibb.

23. On or about October 7, 2002, after the Hayes trial against Courtney, Eli Lilly, and Squibb had begun, Defendant Law Firms informed Plaintiffs that a settlement between Mrs. Hayes and the Eli Lilly and Squibb defendants had been reached, and that as a part of the settlement of the Hayes case, the case and claims of Plaintiffs Tilzers, as well as the cases of over three hundred (300) other victims (most of whom were represented by Defendants), had been settled as well as part of a conditional global settlement.

24. At no time prior to the announcement of the Hayes settlement were Plaintiffs Tilzers consulted or told by Defendants how the settlement being discussed would impact their claims. Prior to hearing of the settlement during the Hayes trial, none of the Plaintiffs Tilzers were consulted about the settlement or terms of the settlement, or asked by their lawyers

for permission to enter into settlement negotiations or to discuss aggregate settlement negotiations.

25. After learning of the proposed settlement terms and structure, Plaintiffs Tilzers repeatedly asked Defendants for information relative to the terms and merits of the settlement and whether there was any potential conflict of interest involving the defendants. Defendants, however, failed to meaningfully disclose the requested information.

26. Between early October and late November of 2002, Defendant Law Firms began to pressure Plaintiff Tilzers to agree to the terms of the global settlement the Defendant Law Firms "entered into" with the drug companies to resolve the claims of Hayes against the drug companies.

27. The structure of the aggregate settlement agreement provided that unless each plaintiff signed the necessary paperwork, Eli Lilly and/or Squibb would not be bound by the settlement agreement, which would then jeopardize Defendants' fees in not only the Hayes settlement, but also in the hundreds of other cases represented by Defendants.

28. On or about November 30, 2002, representatives of the Defendant Law Firms met with Plaintiffs Jerry Tilzer, Todd Tilzer, and Jill Jokelson at the home of Plaintiff Jerry Tilzer in Johnson County, Kansas, to discuss the proposed "settlement" with the drug companies and to obtain the consent of the Plaintiffs Tilzer. In this meeting, Plaintiffs commenced by instructing their counsel that they were not in agreement with the proposed settlement and that Defendant Law Firms were to proceed as quickly

as possible to trial. In response, Defendant Law Firms told the Plaintiffs the following in order to induce and compel Plaintiffs to sign the settlement documents:

a. Plaintiffs Tilzer could not prevail on their claims against Lilly and Squibb;

b. The trial judge was predisposed toward the settlement and would be incapable of treating the Tilzers and their claims in a fair and impartial manner if they refused to sign the settlement documents;

c. If the Tilzers refused to sign the documents and otherwise refused to consent to the settlement, the Tilzers would not receive anything for the loss of Rita Tilzer;

d. Contrary to prior representations, there was no mechanism to get the Tilzer claims to trial quickly; and

e. Defendant Law Firms, Davis, Bethune and Davis, Ketchmark, would refuse to represent the Tilzers and pursue their case further, and the individual attorneys, (Davis and Ketchmark), would withdraw from further representation, if Plaintiffs refused to sign the settlement documents.

29. Plaintiffs stated that they would consider the information presented to them by their attorneys, but at the conclusion of the November 30 meeting, Plaintiffs Tilzer instructed their counsel that they were not in agreement with the proposed settlement.

30. At all relevant times herein, Plaintiffs relied upon the assertions of the defendants at the November 30 2002 meeting as well as the other assertions set forth herein. Upon information and belief, the representations described in subparagraphs 28(a)-(e) above were known to be, or should have been known to be, false when made by Defendants.

31. At and prior to this November 30, 2003 meeting, Plaintiffs were not provided with a copy of the document entitled "Terms of Settlement Agreement In Re: Courtney Litigation." This document, which purportedly contains the terms of the global settlement, was not received by Plaintiff Jerome S. Tilzer until the evening of Friday, December 20, 2002, along with an ultimatum from Grant Davis to sign all settlement documents and deliver same to his office by December 26, 2002.

32. Thus, in late December of 2002, Plaintiff Jerry Tilzer received an ultimatum from his counsel to the effect that Plaintiffs must sign the settlement documents by no later than December 26, 2002, or they would lose all rights to pursue claims for the death of Rita Tilzer. Plaintiff Jerry Tilzer received this ultimatum after Defendant Law Firms were closed for the holidays and while Defendant Law Firms were unavailable to consult with Plaintiffs.

33. Under the terms of the document entitled "Terms of Settlement Agreement In Re: Courtney Litigation" there was in fact no December 26, 2002 deadline for Plaintiffs to sign the settlement documents or forego their claims, a fact which was known, or should have been known, to Defendants when they informed Plaintiff Jerry Tilzer that he had

to execute the settlement documents by no later than December 26, 2002.

34. Plaintiffs Jerry Tilzer, Todd Tilzer, and Jill Jokelson, in response to their counsels' threats, ultimatums, and false inducements signed the settlement documents and delivered same to Shawn Foster of Defendant Davis Bethune on December 26, 2002, at the home of Jerry Tilzer in Johnson County, Kansas. Plaintiffs signed the Settlement and Release Agreement and Confidentiality Agreement, on December 26, 2002, because they believed and understood that they had no choice or options.

35. At no time prior to signing the settlement documents on December 26, 2002, were Plaintiffs made aware of information concerning the existence and nature of the claims involved in the aggregate settlement, or of the participation of each claim, including the following:

a. what information would be considered by the mediator;

b. what information would be considered in the arbitration to evaluate the total award to be allocated among the claimants;

c. that the arbitrators would not consider an evaluation of Tilzers' claims as well as the claims of the other litigants to arrive at the aggregate sum;

d. the terms of the arbitration agreement referenced in the settlement agreement;

e. the facts and nature of each claim that would compete for a share of the fund;

f. that the 34 claimants of whom Courtney specifically admitted diluting the cancer drugs would be treated the same as the remaining claimants whom Courtney did not specifically identify;

g. the number of claims where the patient had died from cancer;

h. the methodology to be employed by the Special Master for evaluating each claim;

i. the criteria to be considered by the Special Master for evaluating each claim;

j. the facts of each claim that the Special Master would consider in evaluating each claim;

k. what conflicts of interests arose as a result of the aggregate settlement, or otherwise;

l. how counsel's representation of the other claimants would be directly adverse to the interests of plaintiffs;

m. how counsel's representation of the other claimants would materially limit counsel's representation of plaintiffs;

n. an explanation of the implications of the common representation and the advantages and risks involved; and,

o. what conflicts of interests arose as a result of the conditioning of the aggregate settlement on the settlement of the Georgia Hayes case.

36. During the preparation by the Plaintiffs Tilzer of their claim form as a part of the settlement agreement, Plaintiffs received no assistance, advice or counsel in the preparation of the form or how to maximize their allocation in the claims process.

37. Following submission of the claim form, Plaintiffs Tilzer learned that the Special Master awarded Plaintiffs $308,000 for the loss of Rita Tilzer.

38. Plaintiffs had understood from their lawyers that an appeal process existed which would permit this Court to review their award. Plaintiffs instructed their lawyers to file objections to the settlement for the reasons set forth in the written objections; said objection was overruled by the trial court on June 5, 2003.

39. The court-appointed Plaintiffs Steering Committee, of which defendants were members, however objected to Plaintiffs Tilzer's objections to the process and award, a fact never disclosed by Defendants Davis, Bethune or Davis, Ketchmark to Plaintiffs Tilzer.

40. Following objections to the settlement being overruled, and on or about June 18, 2003, Plaintiff Jerry Tilzer received correspondence from Grant Davis, enclosing an *Affidavit of Jerome Tilzer* and *Release of Courtney Qualified Settlement Fund,* to sign. Plaintiff Jerry Tilzer refused to sign the aforesaid documents and has continued to refuse to sign these

documents because of his objections to the settlement and because the documents would release his former counsel from any claims Plaintiffs Tilzer may now have.

41. On or about November 14, 2003, Defendants Davis, Bethune and Davis, Ketchmark, filed Motions for Leave to Withdraw as Counsel for Plaintiffs Jerome Tilzer, Todd Tilzer, and Jill Jokelson, said Motion for Leave to Withdraw being granted by the Court on or about November 26, 2003.

COUNT I: BREACH OF FIDUCIARY DUTY

42. Plaintiffs incorporate all facts and allegations contained in paragraphs 1 through 41 of this Petition as if fully set forth herein.

43. The attorney-client relationship is a fiduciary relationship as matter of law. A fiduciary relationship is one of special trust and confidence. The law requires that all dealings between an attorney and client be characterized by the utmost good faith, candor and honesty. An attorney must affirmatively disclose to his client all material facts bearing on the client's case, as well as the legal consequences flowing from the facts.

44. As attorneys for Plaintiffs Tilzer, Defendant Law Firms, and their individual lawyers, owed Plaintiffs Tilzer various fiduciary duties, including the duties of competent and diligent representation, to communicate with their clients and keep their clients properly and promptly informed, to abide by the clients' decisions concerning the objectives of representation, to keep personal information of the

clients confidential. Defendants also owed Plaintiffs the duty of undivided loyalty, and the duty to not engage in conflicts of interest and to not engage in self-dealing and transactions with conflicts of interests, contrary to the interests of the clients.

45. Defendant Law Firms committed breaches of their fiduciary duties owed Plaintiffs, without limitation, in at least the following ways

a. forcing and intimidating Plaintiffs into consenting to a settlement of their claims, against their consent, agreement and interests;

b. failing to properly advise Plaintiffs of the necessary facts concerning the "aggregate settlement" entered into by Plaintiffs' counsel during the Hayes litigation;

c. failing and refusing to pursue Plaintiffs' claims against the defendant drug companies in a competent diligent manner;

d. representing and preferring interests and parties in conflict with the interests of Plaintiffs;

e. abandoning Plaintiffs and threatening to abandon the claims and cases of Plaintiffs;

f. engaging in conflicts of interests and self-dealing with respect to the representation of various claimants in the Courtney litigation;

g. entering into settlements without the consent of Plaintiffs, contrary to the interests of Plaintiffs

and as a part of self-dealing for the benefit of Defendant Law Firms; and

h. imposing false deadlines to obtain agreement to the settlement by Plaintiffs.

46. As a direct and proximate result of Defendants' breaches of fiduciary duties as aforesaid, Plaintiffs Tilzer have sustained damages in an amount in excess of $75,000 each, as will be determined by the evidence.

WHEREFORE, Plaintiffs Tilzer request the Court enter judgment in their favor on Count I in an amount in excess of $75,000 each, for disgorgement of any fees received or to be received from Plaintiffs, Plaintiffs' costs incurred, and any other relief the Court deems just and proper.

COUNT II: PROFESSIONAL NEGLIGENCE

47. Plaintiffs incorporate all facts and allegations contained in paragraphs 1 through 46 of this Petition as if fully set forth herein.

48. In undertaking the legal representations and creating the attorney-client relationships, Defendants owed Plaintiffs a duty to use ordinary care, that is, to do that which an attorney of ordinary prudence would have done under the same or similar circumstances.

49. As attorneys for Plaintiffs Tilzer, Defendant Law Firms thus owed Plaintiffs Tilzer a duty to use ordinary care, including the duties of competent and diligent representation, to communicate with their client and keep their clients promptly informed, to

abide by the clients' decisions concerning the objectives of representation, to keep personal information of the clients confidential, of undivided loyalty, and to not engage in either conflicts of interest and to not engage in self-dealing and transactions with conflict of interests, contrary to the interests of the clients.

50. Defendant Law Firms breached the duty of care and committed negligence in the representation of Plaintiffs and in the settlements of Plaintiffs' claims, without limitation, in at least the following ways:

a. forcing and intimidating Plaintiffs into consenting to a settlement of their claims, against their consent, agreement and interests;

b. failing to properly advise Plaintiffs of the necessary facts concerning the "aggregate settlement" entered into by Plaintiffs' counsel during the Hayes litigation;

c. failing and refusing to pursue Plaintiffs' claims against the defendant drug companies in a competent diligent manner;

d. representing and preferring interests and parties in conflict with the interests of Plaintiffs;

e. abandoning Plaintiffs and threatening to abandon the claims and cases of Plaintiffs;

f. engaging in conflicts of interests and self-dealing with respect to the representation of various claimants in the Courtney litigation;

g. entering into settlements without the consent of Plaintiffs, contrary to the interests of Plaintiffs and as a part of self-dealing for the benefit of Defendant Law Firms; and

h. imposing false deadlines to obtain agreement to the settlement by Plaintiffs.

51. As a direct and proximate result of Defendants' professional negligence, as aforesaid, Plaintiffs sustained damages in an amount in excess of $75,000 each, as will be determined by the evidence.

WHEREFORE, Plaintiffs Tilzer request the Court enter judgment in their favor on Count II in an amount in excess of $75,000 each, Plaintiffs' costs incurred, and any other relief the Court deems just and proper.

COUNT III: NEGLIGENT MISREPRESENTATION

52. Plaintiffs incorporate all facts and allegations contained in paragraphs 1 through 51 of this Petition as if fully set forth herein.

53. As part of Defendants' representation of Plaintiffs, Defendants had a pecuniary interest in any settlement reached by Plaintiffs. In order to secure Plaintiffs' agreement to the global settlement, Defendants made numerous false representations to Plaintiffs for their guidance in deciding whether to accept the settlement proposal and to execute documents necessary to join the global settlement. Thus, lawyers for Defendants while acting in the course of their profession and in connection with a

transaction in which they had a pecuniary interest, supplied false information to Plaintiffs Tilzer for guidance in deciding whether to accept the settlement proposal and to execute documents necessary to join the global settlement. Defendants failed to exercise reasonable care or competence in communicating, without limitation, at least the following false information:

a. threatening to abandon the claims and cases of Plaintiffs;

b. failing to properly advise Plaintiffs of the necessary facts concerning the "aggregate settlement" entered into by Plaintiffs' counsel during the Hayes litigation;

c. entering into settlements without the consent of Plaintiffs; and

d. imposing false deadlines to obtain agreement to the settlement by Plaintiffs.

54. As a direct and proximate result of Defendants' negligent misrepresentations, as aforesaid, Plaintiffs sustained damages in an amount in excess of $75,000 each, as will be determined by the evidence.

WHEREFORE, Plaintiffs Tilzer request the Court enter judgment in their favor on Count III in an amount in excess of $75,000 each, for disgorgement of any fees received or to be received from Plaintiffs, Plaintiffs' costs incurred, and any other relief the Court deems just and proper.

COUNT IV: BREACH OF CONTRACT

55. Plaintiffs incorporate all facts and allegations contained in paragraphs 1 through 54 of this Petition as if fully set forth herein.

56. Defendant Law Firms entered into an agreement with Plaintiffs Tilzer, and agreed and promised to render legal services, advice and opinions to Plaintiffs with the requisite skill, care and diligence commonly possessed and exercised in such matters of professional employment by members of the legal profession.

57. Pursuant to this Agreement, Defendant Law Firms represented Plaintiffs Tilzer from September of 2001 through November of 2003.

58. Defendant Law Firms breached their contract with Plaintiff Tilzers, without limitation, in at least the following ways:

a. forcing and intimidating Plaintiffs into consenting to a settlement of their claims, against their consent, agreement and interests;

b. failing to properly advise Plaintiffs of the necessary facts concerning the "aggregate settlement" entered into by Plaintiffs' counsel during the Hayes litigation;

c. failing and refusing to pursue Plaintiffs' claims against the defendant drug companies in a competent diligent manner;

d. representing and preferring interests and parties in conflict with the interests of Plaintiffs;

e. abandoning Plaintiffs and threatening to abandon the claims and cases of Plaintiffs;

f. engaging in conflicts of interests and self-dealing with respect to the representation of various claimants in the Courtney litigation;

g. entering into settlements without the consent of Plaintiffs, contrary to the interests of Plaintiffs and as a part of self-dealing for the benefit of Defendant Law Firms and; and

h. imposing false deadlines to obtain agreement to the settlement by Plaintiffs.

59. As a direct and proximate result of Defendants' breaches of contract, as aforesaid, Plaintiffs Tilzer sustained damages in an amount in excess of $75,000 each, as will be more fully determined by the evidence.

WHEREFORE, Plaintiffs Tilzer request the Court enter judgment in their favor on Count IV in an amount in excess of $75,000 each, along with Plaintiffs' costs incurred and any other relief the Court deems just and proper.

COUNT V: FRAUD

60. Plaintiffs incorporate all facts and allegations contained in paragraphs 1 through 59 of this Petition as if fully set forth herein.

61. Defendants committed fraud upon Plaintiffs in order to induce them to accept their allocated settlements and to execute documents necessary to conclude the settlements. Defendants made numerous false oral and written representations, and withheld various material facts, without limitation, in at least the following ways:

a. threatening to abandon the claims and cases of Plaintiffs;

b. failing to properly advise Plaintiffs of the necessary facts concerning the "aggregate settlement" entered into by Plaintiffs' counsel during the Hayes litigation;

c. entering into settlements without the consent of Plaintiffs; and

d. imposing false deadlines to obtain agreement to the settlement by Plaintiffs.

62. As a direct and proximate result of Defendants' fraud, as aforesaid, which were reasonably relied upon by Plaintiffs, Plaintiffs sustained damages in an amount in excess of $75,000 each, as will be determined by the evidence.

WHEREFORE, Plaintiffs Tilzer request the Court enter judgment in their favor on Count III in an amount in excess of $75,000 each, for disgorgement of any fees received or to be received from Plaintiffs, Plaintiffs' costs incurred, and any other relief the Court deems just and proper.

JURY TRIAL DEMANDED

COME NOW Plaintiffs and request trial by jury for all matters in this civil action so triable.

Respectfully submitted,

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